Mrs Euphan Hamilton
& Mr Ch. Hamilton

August 1. 1758.

40

INFORMATION

5 Dec
1760
Barnton

FOR

Mrs *Euphame Hamilton*, Executrix and neareſt of Kin of the deceaſed Miſs *Marion Hamilton* of *Roſehall*, and her Huſband for his Intereſt;

39.

AGAINST

Mr *Archibald Hamilton* now of *Roſehall*.

THE Subject-matter of Diſpute between the above-named Parties, in the now depending Proceſs of Multiple-poinding, brought in name of the Tenants of the Eſtate of *Roſehall*, is the Rents of ſaid Eſtate that became due during Miſs *Hamilton*'s Poſſeſſion, in ſo far as theſe remained unuplifted at her [illegible].

Mr *Hamilton* founds his Claim to theſe Rents upon a double Title. 1*ſt*, That, under the Settlements of the Eſtate of *Roſehall*, to be hereafter more particularly mentioned, he was preferable in the Succeſſion of this Eſtate to Miſs *Marion Hamilton* herſelf, though Judgment had gone againſt him upon this Point, in the late Queſtion between him and the ſaid Miſs *Marion Hamilton*. 2*dly*, That ſuppoſing Miſs *Hamilton* ſhould be again found to have been prior to him in point of Succeſſion; yet as ſhe died in a State of Apparency, and as he is now become the undiſputed Heir of Tailzie and Proviſion in ſaid Eſtate, and has made up his Titles accordingly, he has thereby the preferable Right to the Rents of theſe Lands.

Mrs *Hamilton*'s Title, on the other hand, is, *qua* Executrix and neareſt of Kin to the ſaid Miſs *Marion Hamilton*. And as theſe Rents had become due during Miſs *Hamilton*'s Incumbency, though ſhe had not eſtabliſhed in her Perſon the Right of Fee of the Lands themſelves, ſhe is adviſed, that, in competition with the next Heir, ſhe has the preferable Title. And the Lord Ordinary being to report to your Lordſhips the Debate, this Information is humbly offered, on the Part of Mrs *Hamilton*, the Executrix and neareſt of Kin.

And as Mr *Hamilton* thus pleads under a double Character, and, under the firſt of theſe, [illegible]umes or refers to the very ſame Arguments which he former[illegible]aded in the Queſtion with Miſs *Hamilton* herſelf, about the Property of this Eſtate; it is in that View neceſſary, that your Lordſhips ſhould again take under Conſideration the Se[illegible]ements of ſaid Eſtate, and the Arguments pleaded *hinc inde* [illegible] that former Competition; which therefore ſhall be reſtated, in [illegible]s few Words as the Nature of the Caſe will admit, without entering into any Argument upon the various Points which formerly received your Lordſhips Judgment, by one general Interlocutor, "aſſoilzying Miſs *Hamilton* "from the Proceſs of Declarator at *Dalziel*'s Inſtance, and find-"ing, that he was not intitled to be ſerved Heir of Tailzie and "Proviſion in that Eſtate, in competition with her."

1682 Sir *Archibald Hamilton*, of this Date, acquired a Wadſet of the Lands of *Kirkwood*, by Diſpoſition from Sir *Alexander Hamilton* of *Hags*, qualified by a Backbond, declaring the ſame to be redeemable upon Payment of *L.* 11,333 : 6 : 8 *Scots*.

Sir *Archibald* did alſo acquire Right to ſeveral Adjudications deduced againſt the ſaid Sir *Alexander Hamilton*, and to certain Infeftments of Annualrent granted by him.

And though it thus appears, that the whole of Sir *Archibald Hamilton*'s Titles to theſe Lands were certain redeemable or ex-
1691. tinguiſhable Securities, he thought proper, of this Date, to execute a Settlement of the Premiſſes, in the Form of a Tailzie, with prohibitive and irritant Clauſes, "in favour of himſelf in "Liferent,

" Liferent, and *James Hamilton* his eldeſt Son in Fee, and the " Heirs-male of his Body; whom failing, to his four younger " Sons *ſeriatim*, whereof *Hugh* was the youngeſt, and the " Heirs-male of their reſpective Bodies; whom failing, to any " other Heir-male lawfully to be procreated of his own Body, " and the Heirs-male of their Bodies; whom failing, to *Mar-* " *garet Hamilton*, his eldeſt Daughter of the firſt Marriage, " and the Heirs-male of her Body; whom failing, to his other " Daughters *ſucceſſivè*, and the Heirs-male of their reſpective " Bodies; which all failing, to ſuch other Perſon as he ſhould " name or appoint to ſucceed to him, by any Writ under his " Hand."

And as this Settlement contained very ample reſerved Powers in favour of Sir *Archibald*, it was thereby, *inter alia*, ſpecially provided and declared, That the Lands ſhould be redeemable by him from his ſaid Son, or other Heirs of Tailzie, *etiam in articulo mortis*, by Payment or Conſignation of a Roſe Noble, upon Premonition of twenty-four Hours, perſonally, or at his own Dwelliug-houſe.

Upon the Procuratory contained in this Tailzie, a Charter under the Great Seal was expede, and Infeftment taken thereupon. 1691.

There had been a partial Ranking of the Creditors upon this Eſtate in 1691. But as Sir *Archibald* had by this Time purchaſed ſeveral of the other Debts and Diligences, he brought a freſh Proceſs of Multiple-poinding, in name of the Tenants; which was concluded by a ſecond Decreet of Ranking, of this Date. 1694.

And as from theſe Proceſſes of Ranking it appeared, that the Debts exceeded the Value of the Eſtate, Sir *Archibald* raiſed a Proceſs of Sale, in his own Name, in 1693. And being preferred as the higheſt Offerer at the Roup, the Lands were adjudged to belong to him, by Decreet of Sale of this Court in 1695. 1695.

And having thus acquired an irredeemable Title of Property to this Eſtate, by the aforeſaid Decreet of Sale, he, of this Date, 1700.

Date, executed a new Settlement, and thereby granted Procuratory for reſigning the ſame in the Hands of his Superior, for new Infeftment thereof to himſelf in Liferent, and his eldeſt Son *James* in Fee, and the Heirs-male to be procreated of *James*'s Body; whom failing, to the ſame Series of Heirs contained in the Tailzie 1691; with this only Variation, that after the Daughters or Heirs-female to be procreated of his own Body, the Daughters of his Sons are called in the ſame Order of Preference as their Fathers had been.

And though this Tailzie was alſo fenced with ſtrict prohibitive and irritant Clauſes, Power was thereby reſerved to Sir *Archibald*, to alter or diſcharge any of the ſaid Clauſes or Conditions, and to alter the Courſe of Succeſſion, as he ſhould think fit.

And as this Tailzie was completed by Charter and Infeftment
1700. that ſame Year; ſo it is material to obſerve, that it contained not only the Lands purchaſed and adjudged to Sir *Archibald* by the Decreet of Sale 1695, but alſo the Lands of *Dundovan*, *Blairmeadow*, and *Rentkill*, which he had acquired by other Titles; all which were thereby erected into one Barony, to be called *the Barony of Roſehall*.

1707. Upon Occaſion of *James* the eldeſt Son's Marriage with Lord *Blantyre*'s Daughter, in 1707, Marriage-articles were executed, to which Sir *Archibald* became a Party, and thereby bound himſelf to reſign the Barony of *Roſehall* for new Infeftment to himſelf in Liferent, and his Son *James*, and the Heirs-male of that Marriage, in Fee; "whom failing, to the Heirs-male "to be procreate of *James*'s Body in any other Marriage; "whom failing, to the Heirs-male procreated or to be procre-"ated of the Body of the ſaid Sir *Archibald*, and the Heirs-"male to be procreated of their Bodies; whom failing, to the "Heirs whatſomever to be procreated of *James*'s Body in any "other Marriage; and failing of them, *to the Heirs whatſom-"ever procreated or to be procreated of the Body of Sir* Archi-"bald; which all failing, to *James*'s neareſt and lawful Heirs

"and

" and Aſſignees whatſomever." And this Tailzie, reſpecting the whole Barony of *Roſehall*, as newly erected by the Charter 1700, was fenced with various prohibitive, irritant, and reſolutive Clauſes, varying in ſeveral Particulars from thoſe contained in the former Tailzies 1691 and 1700.

By the ſame Marriage-contract, Sir *Archibald* did alſo reſign his later Purchaſes, the Barony of *Medrox*, and ſeveral other Lands, to himſelf in Liferent, and his Son *James*, and the Heirs-male of that Marriage, in Fee, and to the ſame *Series* of Heirs as in the Barony of *Roſehall*; with this ſingle Variation, that whereas, in ſubſtituting the Heirs-female in the Barony of *Roſehall*, he had totally neglected the Heirs whatſomever of *James*'s Body of that Marriage, and had called the Heirs whatſomever of *James*'s Body of any other Marriage; this Omiſſion was rectified in the Settlement of the Barony of *Medrox*, *&c.*

But theſe two Settlements, though contained in the ſame Marriage-contract, differed in this other remarkable Circumſtance, that the Barony of *Roſehall* was laid under a ſtrict Entail, whereas the other Lands were left entirely free.

Sir *Archibald* died in 1709: Whereupon Sir *James* entered into Poſſeſſion of the whole Eſtate, in Terms of his Marriage-contract, but did not expede either Charter or Infeftment thereon.

And being thus veſted with an unlimited Power over the Barony of *Medrox*, and other unentailed Lands, he thought fit, of this Date, to execute a Tailzie of theſe, and certain other Lands which he himſelf had acquired, " in favour of himſelf, " and the Heirs whatſomever of his Body; whom failing, to " his Brother *Hugh*, and the Heirs whatſomever of his Body, " with certain Remainders over." 1749.

Upon Sir *James*'s Death, without Iſſue, in 1750, the Succeſſion to his whole Eſtate, entailed and unentailed, opened to his Brother *Hugh*, the only ſurviving Son of Sir *Archibald Hamilton*; who made up his Title to the Barony of *Roſehall* by Service *qua* Heir male and of Tailzie to Sir *James*, in Terms of 1750.

 the

the Deſtination in the Marriage-contract 1707; and thereupon expede Charter under the Great Seal, and Infeftment; and he made up his Title to the other Parts of the Eſtate, in Terms of the Settlement that had been executed by his Brother Sir *James* in 1749.

1755. Sir *Hugh Hamilton* died in *September* 1755. And as he left no Iſſue-male, the Succeſſion of the whole Eſtate devolved on his only Daughter Miſs *Marion Hamilton*, then an Infant; who, independent of her natural Right of Succeſſion, as neareſt Heir of Line to her Father, Uncle, and Grandfather, was called to ſucceed, failing Heirs-male of their Bodies, by all the laſt Settlements ſucceſſively made by them. And as by Law ſhe was intitled to continue her Father's Poſſeſſion, ſhe, and her Tutors in her Name, entered upon the Poſſeſſion of the Eſtate, and continued that Poſſeſſion, by levying the Rents from the Tenants till her Death.

Miſs *Hamilton*'s Tutors were alſo about to have completed the Titles in her Perſon, but were ſtopped and interrupted therein by Mr *Archibald Hamilton* of *Dalziel*, the Grandſon of Sir *Archibald* by his eldeſt Daughter *Margaret*; who, having purchaſed Brieves forth of his Majeſty's Chancery, claimed to be ſerved Heir to his Uncle Sir *Hugh* in the Barony of *Roſehall*, which was accompanied by a correſponding Proceſs of Reduction and Declarator.

Miſs *Hamilton*, by her Tutors, oppoſed this Service, and pleaded her preferable Right to that Eſtate under the later Deeds of Settlement.

The Grounds of Preference pleaded for Mr *Hamilton* of *Dalziel* reſolved in the following Particulars. 1*ſt*, That as, by the Tailzie 1691, *Margaret* the eldeſt Daughter was *nominatim* called to the Succeſſion, upon the Failure of Heirs-male of *Archibald*'s Body, preferably to his Son's Daughters; and as the Heirs-male had now failed in the Perſon of Sir *Hugh*, he had clearly the preferable Right, under the Tailzie 1691, in competition with Miſs *Hamilton*, the Daughter of Sir *Hugh*.

2*dly*, That as Sir *Archibald* was conſtituted only Liferenter by

by the Tailzie 1691, with certain reſerved Faculties, he had no Power to alter the Settlement in that Tailzie, or to execute a new Settlement and Tailzie of that Eſtate, unleſs he had previouſly redeemed the Lands, by uſing the Order of Redemption in the Form and Manner thereby preſcribed, in order to reinſtate the Fee in him.

3*dly*, That as no ſuch Order of Redemption appeared to have been uſed, the Tailzie 1700 flowed *a non habente*; and Sir *Archibald* could not thereby create to himſelf a Faculty or Power ver that Eſtate, which was not competent to him by the Tailzie 1691.

4*thly*, That the Tailzie or Settlement 1707, in Sir *James*'s Marriage-contract, fell under the ſame Objection, if it could be ſuppoſed, that it had been thereby intended to alter the Order of Succeſſion eſtabliſhed by the Tailzie 1691, by preferring the Son's Daughters to Sir *Archibald*'s own Daughters, and their Iſſue-male.

5*thly*, But that as, by the Tailzie 1700, as well as by the Tailzie 1691, Sir *Archibala*'s Daughters, and their Heirs-male, were clearly called to the Succeſſion of this Eſtate preferably to the Son's Daughters; and as there was no Reaſon to preſume, that Sir *Archibald* meant to make any Alteration in the Order of Succeſſion, but in favour of the Daughters or Heirs-female of his Son *James*'s Body, in whoſe Marriage-contract that Settlement was made; and as, failing them, he had ſubſtituted *the Heirs whatſomever procreated or to be procreated of the Body of Sir* Archibald, theſe Words were deſcriptive of Sir *Archibald*'s own Daughters, and their Iſſue, preferably to the Son's Daughters; that theſe Words, *Heirs whatſomever*, had no determined fixed Meaning, but, according to Circumſtances, and the Intendment of Parties, might be taken in a more limited or extenſive Senſe; and therefore that, even under the Marriage-ſettlement 1700, he, as in right of his Mother, Sir *Archibald*'s eldeſt Daughter, was preferable to Miſs *Hamilton*, the Daughter of Sir *Hugh*.

6*thly*, That Sir *James* had never acknowledged the Settlement

ment in the Marriage-contract 1700, but had poſſeſſed the Eſtate, and eſtabliſhed the Right in his own Perſon upon different Titles; and therefore that it was cut off by the negative Preſcription.

It was, on the other hand, contended for Miſs *Hamilton*, 1*ſt*, That the Diſpoſition 1691, when meant to be ſupported as a Tailzie, or ſtrict Settlement, was abſurd, and could receive no Countenance or Authority from the Statute 1685, in regard that as Sir *Archibald*'s only Right to the ſaid Lands at that Time was the aforeſaid redeemable and extinguiſhable Securities, he could not tailzie an Eſtate which did not belong to him.

2*dly*, That this Settlement was totally evacuated and overthrown by the after Sale of this Eſtate, as the acknowledged Property of Sir *Alexander Hamilton* of *Hags*, and by the Decreet of Sale following thereon. And though Sir *Archibald* became the Purchaſer, it was a new Eſtate which he had thereby acquired, which could not revive the Tailzie 1691, which was already ſopited and evacuated.

3*dly*, That, from the whole Tenor of the Tailzie 1691, it was apparent, that Sir *Archibald* meant to reſerve to himſelf full and abſolute Powers over that Eſtate, to do therewith as he ſhould think proper: That the Order of Redemption therein mentioned was Matter of mere Form, which had no other Meaning but to indicate Sir *Archibald*'s Intention to reſume that Eſtate: And therefore, that though no ſuch Order had been uſed, Equity would not permit ſuch a Punctilio to be laid hold of to defeat Sir *Archibald*'s after Settlements.

4*thly*, That ſuppoſing the Formality of a Redemption had been neceſſary, a poſitive Proof thereof could not now be required; *Poſt tantum temporis omnia præſumuntur ſolenniter acta*: And as Sir *James*, from whom the Eſtate was to be redeemed, had acknowledged Sir *Archibald*'s Powers over that Eſtate, he muſt be underſtood to have thereby alſo acknowledged, that every

every Thing had been done which was neceſſary to reinſtate Sir *Archibald* in the Right.

5thly, That as *James*, the eldeſt Son, from whom the Redemption was to be made, had accepted of the Tailzie 1700, under the reſerved Power to Sir *Archibald* to alter the ſame, and had thereafter concurred with Sir *Archibald* in the Marriage-ſettlement 1707, no after Heir could challenge Sir *Archibald*'s Powers, under Pretence that he had omitted to uſe the Form of a Redemption againſt his Son, who concurred in theſe after Settlements.

6thly, That the Deſtination of Succeſſion by the Tailzies 1691 and 1700, was highly irrational, in ſo far as Sir *Archibald*'s Daughters, and their Iſſue-male, were thereby preferred to the Son's Daughters, his natural and lineal Heirs: That the Tailzie 1707 had rectified this Error: And as by this Settlement the Heirs whatſomever of Sir *Archibald*'s Body were called to the Succeſſion, failing his Iſſue-male, and the Heirs whatſomever of his Son *James*'s Body, it could not admit of a Queſtion, that the Son's Daughters were thereby preferred to the Son of a Daughter. That the legal Senſe and Meaning of theſe Words, *Heirs whatſomever* of a Man's Body, was well known, and liable to no Dubiety; and though in ſome Inſtances the Words *Heirs whatſomever*, which in their proper Senſe are deſcriptive of the Heir of Line, had received a more limited Conſtruction, from collateral Circumſtances, and clear Evidence that they were ſo intended by the Maker of the Settlement, no Inſtance did ever occur, or could be produced, where the Words *Heirs whatſomever* of a Man's Body, had been underſtood otherwiſe than in their proper legal Meaning.

7thly, That any Claim competent to *Dalziel* under the Tailzie 1691, was loſt by the negative Preſcription.

8thly, That Miſs *Hamilton*'s Title, as founded upon the Tailzie 1700, completed by Charter and Seiſin, and upon the poſterior Tailzie in the Marriage-contract 1707, was confirmed and eſtabliſhed by the poſitive Preſcription, as under theſe the

Poſſeſſion had been continued from the 1700 downwards. Nor could the Poſſeſſion be aſcribed to any other Title: 1*ſt*, In reſpect of the Charter and Infeftment following thereon; 2*dly*, For that as the Tailzie 1700 contained ſeveral other Lands beſides thoſe contained in the Tailzie 1691, and as Sir *James* poſſeſſed the whole, the Title of his Poſſeſſion could not be ſeparated.

9*thly*, That as Sir *James Hamilton* was not an Heir ſubſtitute by the Tailzie 1691, but an immediate Diſponee, no Right could thereby tranſmit to the after Heirs, but by means of his having accepted of that Diſpoſition: That in Fact he had never accepted thereof, but, on the contrary, had repudiated the ſame.

10*thly*, That the Limitations and Fetters in the Tailzie 1691, were not laid upon *James* the Inſtitute or Diſponee, but upon the Heirs of Tailzie, properly ſo called; and therefore that *James* was at Liberty to vary and alter the Order of Succeſſion thereby eſtabliſhed; and that no Argument from Intention could be admitted, to impoſe Fetters beyond what the Tailzier himſelf had done in clear and expreſs Words; and that ſo the Court had judged in many recent Caſes.

11*thly*, That Sir *Archibald*, the Maker of the Entail, concurring with his Son *James* the Fiar, had Power to alter that Settlement, as had likewiſe been found in many ſimilar Caſes; and therefore that *Dalziel*'s Claim, as founded upon that Tailzie, had no juſt Foundation.

Theſe were in ſubſtance the capital Points pleaded for the different Parties, which were endeavoured to be maintained by their reſpective Anſwers, Replies and Duplies, the Particulars of which ſhall not now be reſumed, as they cannot have eſcaped your Lordſhips Remembrance, and, being Arguments in Law, will readily occur.

The Judgment which your Lordſhips gave in the aforeſaid Competition, was, " finding, That Mr *Archibald Hamilton* " *(Dalziel)* cannot be ſerved Heir of Tailzie and Proviſion " either

" either to Sir *James* or Sir *Hugh Hamiltons*, his Uncles, upon " the Titles now claimed upon by him; and therefore diſmiſſ- " ed the Brieves purchaſed forth of the Chancery, at the In- " ſtance of the ſaid Mr *Archibald Hamilton*, for obtaining him- " ſelf ſerved Heir of Tailzie and Proviſion to his ſaid two " Uncles, and haill Procedure thereon: And alſo aſſoilzie Miſs " *Marion Hamilton* from the Declarator at the Inſtance of the " ſaid Mr *Archibald Hamilton* againſt her; and decern."

Mr *Hamilton* of *Dalziel* was pleaſed to prefer a reclaiming Petition againſt the aforeſaid Interlocutor, though it is believed with very little Hope of Succeſs; and as your Lordſhips were pleaſed to allow it to be anſwered, there is Reaſon to think that this proceeded more from the Importance of the Cauſe, in reſpect of the Value of the Eſtate in queſtion, than from any Difficulties that occurred to your Lordſhips upon reconſidering the Caſe. But as, in the mean time, and before that the Anſwers were prepared, Miſs *Hamilton* happened to die, her untimely Fate gave to *Dalziel*, *de jure*, that Eſtate, as Heir of Tailzie and Proviſion under the later Deeds of Settlement, which he had been endeavouring wrongfully to ſtrip her of.

By Miſs *Hamilton*'s Death, the Barony of *Roſehall*, which is of yearly Rent about accrued to Mr *Hamilton* of *Dalziel*; the other Lands, of ſtill greater Value, devolved to Mr *Hamilton* of *Wiſhaw*; and the Executry, or perſonal Eſtate, fell to Mrs *Euphame Hamilton*, Sir *Hugh*'s Siſter by the full Blood.

Mr *Hamilton* of *Dalziel*, not ſatisfied with this lucrative Succeſſion to the Eſtate of *Roſehall*, has thought proper to ſet up a Claim to the Arrears of Rent during Miſs *Hamilton*'s Incumbency, and which were in the Tenants Hands unuplifted at her Death. To make good theſe, he brought a Proceſs of Multiple-poinding, in the Name of his Tenants; in which Compearance being made for Mrs *Euphame Hamilton*, the Executrix and neareſt of Kin, the general Queſtion now to be reported is, Which of the Parties have the preferable Right to theſe Rents?

And,

And, in the Entry, the Executrix will be pardoned to obſerve, that as Mr *Hamilton*'s Claim takes its Riſe from the ſuppoſed Neglect or Omiſſion in Miſs *Hamilton*'s Tutors, of not having completed in her Perſon the Titles to this Eſtate, but ſuffering her to die in a State of Apparency, this Objection is the more unfavourable, as the Attempt he made to evict that Eſtate, and to procure himſelf to be ſerved Heir of Tailzie and Proviſion therein, in preference to Miſs *Hamilton*, did obſtruct and impede the Title from being eſtabliſhed in her Perſon while that Queſtion was in dependence: And therefore it is ſubmitted to your Lordſhips, whether Mr *Hamilton* can now be permitted to take Advantage of that Circumſtance, or whether he is not barred *perſonali exceptione*.

Upon the Merits of the Queſtion itſelf, the Grounds of Preference pleaded for Mr *Hamilton* were theſe two: 1*ſt*, That, by the Settlements of this Eſtate, of the Tenors above recited, by the Marriage-contract 1707, as well as by the Tailzies 1691 and 1700, he was preferable in the Order of Succeſſion to Miſs *Hamilton* herſelf; conſequently the Rents in queſtion belonged of right to him, and could not be claimed by Miſs *Hamilton*'s Executrix. And upon this Point he repeated and referred to the ſeveral Arguments which had been unſucceſsfully pleaded in the former Competition with Miſs *Hamilton* herſelf. And if his Claim to theſe is well founded, he will probably be adviſed, that he has the ſame Title to repeat from Miſs *Hamilton*'s Repreſentatives what of theſe Rents were uplifted by her Tutors during the Time of her Poſſeſſion.

But, not chuſing to rely upon this Ground of Preference, he pleaded, in the *ſecond* place, That as Miſs *Hamilton* died in the State of Apparency, though in Poſſeſſion, ſuch of the Rents as remained unuplifted at her Death did not paſs to her Executrix, but belonged to the next Heir connecting his Title with the Perſon who died laſt veſt and ſeiſed.

And, in ſupport of this Propoſition, it was contended, That, by the Law of *Scotland*, there was no ſuch Thing known as an *ipſo*

ipſo jure Tranſmiſſion of the Fee or Property of Lands from the Dead to the Living: *Mortuus non ſaſit vivum:* That while the apparent Heir lay out unentered, the Eſtate itſelf, and conſequently the Rents, remained *in hereditate jacente* of that Perſon who died laſt veſt and ſeiſed, with whom the Heir entering behoved to connect his Title, and thereby carried all the Rents ſtill *in medio* which had become due during the Incumbency of the former apparent Heir unentered: That, upon this Principle, Adjudications *cognitionis cauſa* drew back to the Death of the Perſon laſt infeft, and carried all the *interim* Rents: That the apparent Heir's Title to theſe Rents was merely a poſſeſſory Right, which died with himſelf: He might continue his Predeceſſor's Poſſeſſion, and thereby acquire what of the Rents he actually uplifted: That having once attained Poſſeſſion, he might continue the ſame by Proceſſes of Mails and Duties againſt the Tenants; but that this Right did not paſs to his Heirs, ſo as to give them any Title to any of the Rents that remained unuplifted at the apparent Heir's Death; and that though, of later Years, the contrary had been found in ſome particular Caſes, the Currency of the Deciſions, eſpecially the older ones, favoured his Claim.

It was, on the other hand, pleaded for the Executrix, That though, by the ſtrict Principles of the Feudal Law, allowed of in the Practice of the Law of *Scotland*, certain Formalities were requiſite to tranſmit and veſt in the apparent Heir the feudal Right of Property of Lands, the Genius of the Law of *Scotland* in general, eſpecially by the later Practice, was to render the Tranſmiſſion of Property as eaſy as poſſible, and to remove all unneceſſary Superfluities: That no Syſtem of Law eſtabliſhed by Uſage and Cuſtom could at once become perfect and complete: That Experience was the Reformer of all Laws; and what Alterations the later Practice had introduced in ſundry Particulars, would readily occur to your Lordſhips; more eſpecially in this very Queſtion touching the Right of apparent Heirs, and the Tranſmiſſion of Property, in moveable as well as heritable Subjects, from the Dead to the Living.

And, more particularly, that, by the more ancient Practice, the ſame rigid Principles prevailed in the Tranſmiſſion of the Executry or perſonal Eſtate. Confirmation was not only deemed to be neceſſary, as the *additio hereditatis in mobilibus*, but every Article behoved to be given up in the Inventory of the confirmed Teſtament; and nothing omitted out of that Inventory was carried by the Confirmation, but remained *in hereditate jacente*, to be taken up by the next neareſt of Kin confirming; as appears, not only from the Opinion of our Lawyers, but by many Deciſions.

But as, by Experience, this was found to be attended with many Inconveniencies and Hardſhips, the Syſtem of Law had, in this Particular, received great Alterations in the Practice of later Years. The bare Poſſeſſion of the *bona mobilia*, though ſtill extant unconſumed, veſted the Property of theſe in the neareſt of Kin for the Time being, who had once attained Poſſeſſion, which, after his Death, would tranſmit to his neareſt of Kin. Confirmation of any one Particular was now held to be ſufficient to veſt the whole Executry; and Payment made to the neareſt of Kin of Debts due to the Defunct, though not confirmed, or given up in Inventory, was a ſufficient Acquittal to the Debtors.

That even by the moſt ancient Law of *Scotland*, apparent Heirs were allowed ſeveral important Rights and Privileges, before they made up their Titles by Service; whereof the moſt important was, the Privilege of continuing the Predeceſſor's Poſſeſſion; and from thence aroſe the apparent Heir's Right to the *interim* Rents of the Predeceſſor's Eſtate during his own Incumbency and Poſſeſſion: That this Right did not require any ouvert Act of the apparent Heir's to denote his Intention of continuing his Predeceſſor's Poſſeſſion. It was the Operation of the Law, which held the apparent Heir to be in Poſſeſſion, without any Interruption, from the Moment his Predeceſſor's Breath went out; and, in this reſpect, as well as in many others, he was deemed to be *eadem perſona cum defuncto*.

That

That it would be a Paradox of the Law to ſuppoſe, that the apparent Heir, apprehending Poſſeſſion of any Subject which did not of Right belong to him, could transfer, or veſt in him the Property of that Subject: and therefore the Conceſſion made, that ſo much of the Rents as the apparent Heir did actually levy, would tranſmit to his Executors; and that the next Heir entering to the Fee of the Eſtate, would have no Title to repeat theſe from the Repreſentatives of ſuch apparent Heir, was a plain Admiſſion of the apparent Heir's Right to the *interim* Rents that had fallen due during his Poſſeſſion of the Eſtate.

That this Poſſeſſion of the apparent Heir had received ſo much Countenauce by the Statute Law of this Country, even with reſpect to the Property or Fee of the Eſtate, that by the Act 1695, he could charge the Eſtate *in valorem*, with all his onerous Debts and Deeds: Third Parties contracting with the apparent Heir in Poſſeſſion, were conſidered to be *in bona fide*, without nicely examining, whether he had completed his Titles by Service and Infeftment. And if this Poſſeſſion was juſtly held to have ſo ſtrong an Effect, even with regard to the Fee of the Eſtate, how much more ſtrongly ought it to operate with regard to the *interim* Rents? Creditors ſeeing the apparent Heir in Poſſeſſion, have no Reaſon to doubt his Right to the Rents during the Time of his Poſſeſſion; and, upon the Faith thereof, to lend their Money, or give him Credit, truſting to be paid how ſoon their Rents come in. But if, the Moment his Breath expires, his Right to theſe interim Rents evaniſhes, it is eaſy to perceive how fatal the Conſequences would in many Caſes be: And it muſt ſound extremely odd, that the Debts of that apparent Heir ſhould be available to affect the Fee of the Eſtate, but unavailable to affect the Rents which had become due during his Poſſeſſion; and which, *ex conceſſis*, he was intitled to have uplifted, and could not have been interpelled from ſo doing by any Mortal.

And therefore it being undoubted Law, from the Deciſions in this Court, to be hereafter mentioned, that, even after the apparent

apparent Heir's Death, his Creditors are intitled to be paid their Debts out of the Rents which had fallen due during his Poſſeſſion, though unuplifted, and which is not controverted on the Part of Mr *Hamilton*, the Executrix will be pardoned to ſay, that it is quite inconceivable, upon what Principle this can be maintained, but upon Suppoſition, that the Right of Apparency, and Poſſeſſion of the Eſtate, was a legal Title to the Rents that fell due during the apparent Heir's Incumbency, whether uplifted or unuplifted; and, conſequently, that theſe, ſo far as unuplifted, were attachable by his Creditors.

Theſe are the Principles upon which the Executrix pleads to have the preferable Right to the Rents *in medio*, in Competition with Mr *Hamilton*, the next Heir of Tailzie and Proviſion in the Eſtate itſelf; and ſhe will now endeavour to ſatisfy your Lordſhips, that her Claim to the Premiſſes is founded both in the Opinion of our Lawyers of the firſt Character, and in the Deciſions of this Court; and will begin with the lateſt of theſe, moſt ſolemnly determined but the other Day, in the Competition between *Houſton* of *Johnſton* and *John Stewart-Nicolſon* of *Carnock*, with reſpect to Sir *John Houſton*'s Succeſſion; where all the Authorities or Precedents that could be collected, *hinc inde*, were under Conſideration of the Court; and which was ſo much a ſtronger Caſe than the preſent, as the Queſtion there was about the Annualrents of a Sum of Money, deſtined to be laid out in the Purchaſe of Lands, as an Addition to the tailzied Eſtate of *Carnock*.

The Caſe there was, that old Lady *Schaw* ſettled her Eſtate of *Carnock* and *Plain* upon her only Daughter *Margaret*, and the Heirs male and female of her Body: That having alſo conveyed to the ſaid *Margaret* a conſiderable perſonal Eſtate, to the Amount of about *L.* 2000 *Sterling*, ſhe took from *Margaret* an Obligation to employ that Money in the purchaſe of Lands to be annexed and conjoined to the tailzied Eſtate of *Carnock*; and until ſuch Purchaſe could be found, to lend out the Money upon ſufficient Security, and to take the Rights thereof

to

to the ſame *Series* of Heirs, and in the ſame Terms as the Tailzie of the Eſtate of *Carnock*: That the Money was accordingly ſo lent out upon heritable Security, though afterwards paid up by the Debtor; and was thereafter lent out upon perſonal Security, and the Bonds taken in Lady *Houſton*'s own Name: That upon Lady *Houſton*'s Death, ſhe was ſucceeded by her Son, the laſt Sir *John Houſton*, who thereby became intitled to this Sum of *L.* 2000; but never made up any Title thereto; and did not ſo much as attain any Poſſeſſion thereof, but died in a State of Apparency: That Lady *Houſton* conveyed her whole perſonal Eſtate to her youngeſt Daughter *Anne*, Spouſe to Colonel *William Cuningham* of *Enterkine*, with the Burden of her Debts; and particularly of employing the *L.* 2000 for the Purpoſes above mentioned: That upon the Death of Sir *John Houſton* without Iſſue, the Succeſſion to the Eſtate of *Carnock*, and of the aforeſaid Sum of *L.* 2000, devolved upon *John Stewart-Nicolſon*, Lady *Houſton*'s Grandſon by her eldeſt Daughter, Spouſe to Sir *Michael Stewart* of *Blackhall*: That Sir *John Houſton*, by his laſt Will and Teſtament, appointed *George Houſton* of *Johnſton* to be his Executor and univerſal Legatar; and as it thereby occurred to be a Queſtion between him, as Executor to Sir *John Houſton*, and *John Stewart-Nicolſon*, as Heir of Tailzie in the Eſtate of *Carnock*, and in the aforeſaid Sum of *L.* 2000, Which of them had the preferable Right to the Intereſt of the *L.* 2000 that had become due after Lady *Houſton*'s Death, and during the Survivance of Sir *John Houſton* the apparent Heir? that Queſtion was brought to Trial, upon a Multiple poinding in name of Mrs *Cuningham*, the Executrix of Lady *Houſton*: And though the Point was moſt ſtrenuouſly conteſted on the Part of *John Stewart-Nicolſon*, upon the very ſame Principles and Authorities that are in this Caſe pleaded for Mr *Hamilton*, your Lordſhips, by Interlocutor, 28th *June* 1755, " found, " That the bygone Intereſt of the entailed Money, from Lady " *Houſton*'s Death, to the Death of Sir *John Houſton*, her Son, " belongs to Sir *John Houſton*'s Executors or Aſſignees; and

" therefore preferred *George Houſton* of *Johnſton*." And to this Interlocutor you adhered, upon adviſing a very elaborate reclaiming Petition, and Anſwers.

This was a Judgment in point, upon the moſt deliberate Conſideration of all the former Authorities and Precedents; and in ſo much a ſtronger Caſe than the preſent, for that there the Queſtion was about the Annualrents of a Sum of Money, deſtined only to be laid out in the Purchaſe of Lands, but in which the apparent Heir had attained no Poſſeſſion, other than that with which the Law veſts every apparent Heir.

And that the Judgment your Lordſhips gave in that Caſe, was founded both in the Opinion of our Lawyers, and former Precedents, will appear from the following Authorities.

And to begin with that of Lord *Stair*, juſtly eſteemed the Standard-book of the Law of this Country; it is plain, that he conſidered the apparent Heir's Title to the Rents of the Eſtate, during his Apparency, as a Right veſted in him conſequential of his legal Right to continue his Predeceſſor's Poſſeſſion.

In *lib.* 2. *tit.* 1. *parag.* 22. treating of the *jus poſſeſſionis*, and particularly of the apparent Heir's Title to continue his Predeceſſor's Poſſeſſion, he " calls it a *Right*, and lays it down as a Principle, That though the apparent Heir die uninfeft, his neareſt of Kin will have Right to the Rents reſting from his Predeceſſor's Death to his own Death, and will be ſubject to the Payment of his Debts. His Words are: " Like " unto this is the Right of apparent Heirs to poſſeſs their Pre- " deceſſors Rents, though they be not infeft; which will not " only exoner the Poſſeſſors, but if the apparent Heir die un- " infeft, *his neareſt of Kin will have Right to the Rents reſting* " *from his Predeceſſor's Death to his own Death; and theſe will* " *be ſubject to his own proper Debts*, albeit they will not affect " the Land itſelf; but the next apparent Heir muſt enter to " the Defunct laſt infeft, and his Perſon and Eſtate will only " be liable for the Debts of the Defunct to whom he entered; " *and the Rents reſting for the Years of the apparent Heir's Time*

" *when*

" *when he might have entered, belong to his Executors.*" Words cannot be more expreſs.

And to the ſame Purpoſe, in *lib.* 2. *tit.* 2. § 16. where, after obſerving, that an apparent Heir not actually entered, never attained the real Right, he proceeds to ſtate what Right accrued to the apparent Heir from this poſſeſſory Title, which he explains thus. " But every Heir muſt be infeft in Fees; otherwiſe, if they die uninfeſt, they never attain the real Right, " but only a poſſeſſory Title to the Fruits and Rents from the " Predeceſſor's Death till their own Death, *which will belong* " *to their Executors, in ſo far as unuplifted, from their Predeceſſor's Death till their own Death, or Renunciation to be Heir,* " *and will be affected for their proper Debts.*" But, at the ſame Time, gives it as his Opinion, " that if there be a Competition " upon the Defunct Fiar's Debts, they will be preferred to the " apparent Heir's Executor's Creditors:" Plainly importing, that if there be no Debts of the Defunct Fiar, the Executors and Creditors of the apparent Heir will be preferable, *quoad* the intermediate Rents, to the next apparent Heir entering, or his Creditors.

If this Principle is juſt, it is impoſſible to conſider this Right of the apparent Heir's, as a bare perſonal Privilege or Faculty which the apparent Heir may exerciſe himſelf, but which dies with him, if not exerciſed. Was that the Law, the unuplifted Rents could in no Event tranſmit to the Executors of ſuch apparent Heir, nor would they be attachable by his Creditors. The apparent Heir's own Title to theſe Rents, is a *Right*; and that, as every other Right, muſt transfer to his Repreſentatives and Creditors. And ſo this Point was expreſsly determined, 20th *December* 1662, in the Caſe of Lady *Tarſappie contra* the Laird of *Tarſappie*, where a Creditor who had furniſhed Aliment to the apparent Heir, was found entitled to recover his Payment from the next Heir entered, to the Extent of the intermediate Rents. And this Deciſion is again referred to by Lord *Stair*, *lib.* 3. *tit.* 5. *parag.* 2. where, after obſerving, that apparent Heirs are intitled

intitled to continue their Predeceſſors Poſſeſſion, and to purſue for Mails and Duties of their Lands, as in the Caſe of *Oliphant contra* his Tenants, obſerved by *Spottiſwoode*, under the Title *Heirs*, he proceeds in theſe Words: "Yea, the Rents of Lands "were ſo far found to belong to an apparent Heir, that though "he died unentered, the next Heir not entering to him, was "found obliged to pay the former Heir's Aliment, in ſo far as "he intromitted with the Rents of the Years during which "the former apparent Heir lived, 20th *December* 1662, Lady "*Tarſappie contra* the Laird of *Tarſappie: and conſequently*, "*the Rents might be confirmed by his Executors, or arreſted for* "*his Debt.*"

And the like Judgment was given, in the Caſe of *Weir contra Drummond*, 13th *February* 1664, obſerved by Preſident *Gilmour*; where, in a Competition between Mr *Weir*, as Creditor of the deceaſed *Drummond* of *Balloch*, who had died in a State of Apparency, and the preſent *Drummond* of *Balloch*, with reſpect to the intermediate Rents that had become due during the Incumbency of the apparent Heir, your Lordſhips preferred the Creditor of the apparent Heir.

And the Caſe of *Macbrair* of *Netherwood*, 22d *December* 1683, though improperly quoted on the Part of Mr *Hamilton*, as a Judgment in his favour, ſtands directly againſt him. The Caſe there was, that the Grandfather died laſt veſt and ſeiſed in the Eſtate: That the Father poſſeſſed for ſome Years as apparent Heir: That Sir *Robert Crichton* was Creditor to both Grandfather and Father; and, during the Father's Apparency, intromitted with the Rents, by virtue of a Tack from the Father: That after the Father's Death, he charged *Macbrair*, the Grandſon, then a Minor, to enter Heir both to his Father and Grandfather; and thereupon deduced an Appriſing upon the Grandfather's Debts: That *Macbrair* afterwards raiſed a Reduction of this Appriſing; and pleaded, as Mr *Hamilton* now does, That the Rents intromitted with by Sir *Robert Crichton*, during the Father's Apparency, did not belong to his Father, but were *in hereditate jacente*

cente of the Grandfather, and were carried by his Service as Heir to his Grandfather; and therefore behoved to apply in Extinction of his Grandfather's Debts, conſequently to cut down the Appriſing; and that the Overplus belonged to him, as Heir to his Grandfather. The Debate upon this Point produced the firſt Interlocutor, 7th *July* 1681, whereby it was *in terminis* "found, That the Rents unpaid during the Life "of the apparent Heir belonged to his Executors."

This obliged the Purſuer to vary his Plea; and, allowing the Rents to be *in bonis* of the apparent Heir, he inſiſted, That as the apparent Heir could not intermeddle with theſe Rents, without ſubjecting himſelf to his Predeceſſor's Debt; ſo, in Competition between a Creditor of the Predeceſſor, and a Creditor of the apparent Heir, the Predeceſſor's Creditor was preferable: and therefore the Appriſer, who was Creditor to the Grandfather, the Perſon laſt infeft, and alſo Creditor to the Father, the apparent Heir, behoved to apply the Rents which had become due during the Apparency, to the Extinction of the Grandfather's Debts in the firſt Place, upon which the Appriſing had been taken, and, in the ſecond place only, towards Payment of the Father's Debts. And this produced the ſecond Interlocutor, 20th *November* 1683, which, as collected by Preſident *Falconer*, is in theſe Words. "The Lords found, That "although the Mails and Duties were *in bonis* of the interme-"diate Heir, yet they ought to aſcribe, *primo loco*, in ſatisfac-"tion of the Debt due by the Grandfire, who died laſt infeft in "the Eſtate." And as both Lord *Fountainhall* and Lord *Harcus* give the ſame Account of the Deciſion itſelf, it is a Judgment in point. For if the Rents *in medio* had been conſidered as *in hereditate jacente* of the Grandfather, they could not, even *ſecundo loco*, have been applied to the Payment of the apparent Heir's Debt; whereas the Interlocutor finds *in terminis*, that they were *in bonis* of the intermediate Heir. And this is preciſely agreeable to the Rule laid down by Lord *Stair*, whereby, in competition between the Creditors of the laſt infeft, and of

the apparent Heir, he gives the Preference to the Creditors of the laſt infeft; as the apparent Heir himſelf could have no Right to theſe Rents, without being liable for the Debts of the Predeceſſor.

Lord *Harcus*, it is true, is pleaſed to remark, that when this ſecond Judgment was given, the Lords were clear to have altered the former Interlocutor, and to have found, that all unuplifted Rents, Mails, and Duties, remained *in hereditate jacente* of the Perſon laſt infeft, and would be carried by his Heir connecting the Titles with him by Service. But as no ſuch Remark is made by any of the other Collectors of that Deciſion, the Authority of which therefore may juſtly be doubted; ſo it is incompatible with the Words even of the ſecond Interlocutor or Judgment, which finds, "That the Mails and Duties were "*in bonis* of the intermediate Heir."

For as to the two Deciſions referred to by Lord *Harcus* in ſupport of this Opinion, theſe alſo reſt upon his ſingle Evidence. The Deciſion *February* 1688 is not to be found in Lord *Fountainhall*'s Collection, though it contains every Deciſion of the leaſt Importance in that Period; and particularly, the other Deciſion, *January* 1683, *Ballantine contra Bonnar*'s Relict, wherein ſundry Queſtions between the Heir and Executor were decided, but which do not in the leaſt reſpect the preſent Queſtion: And it may reaſonably be ſuppoſed, that ſome of the later Writers upon the Law of *Scotland*, whoſe Opinion in this Particular ſeems to differ from Lord *Stair*, have been led into that Miſtake, by giving too implicit Faith to the above-mentioned Fact, as related by Lord *Harcus*, without looking for the Deciſions quoted by him in ſupport of his Opinion.

But whatever Diverſity there may have been upon this Point, either in the Opinion of our Lawyers, or the Deciſions of the Court, it is now no longer a Queſtion; as all the later Deciſions have uniformly gone in favour of the Executors and Creditors of the apparent Heir, particularly in the above-mentioned Caſe of *Macbrair* of *Netherwood*, 1681 and 1683; and, more recently,

cently, in the Queſtion between the Daughters and Heir of Tailzie of *Campbell* of *Shirvine*. The Caſe of which was, that *Dougald Campbell* executed a Bond of Tailzie, obliging himſelf to reſign his Eſtate in favour of himſelf, and *Archibald* his eldeſt Son, in Liferent; whom failing, to *Dougald*, the eldeſt Son of *Archibald*; and, after ſundry Remainders, to *Alexander Campbell*, and the Heirs-male of his Body, heritably in Fee. *Archibald* made a new Tailzie, preferring his natural Brother *Alexander* to his own Daughters. *Archibald* died in *February* 1737, leaving *Dougald*, his only Son, an Infant, who died in *Auguſt* that ſame Year. Upon *Dougald*'s Death, the Siſters, as Executors to him, claimed the Half of the Rents of the Year 1737, as *in bonis* of him, and falling under his Executry, as he ſurvived the Term of *Whitſunday* that Year, though he died in a State of Apparency. This was conteſted on the Part of the Heir. But the Judgment of the Court was, finding the Siſters to have Right to the Half of the Rents of the Year libelled, though their Brother died in the State of Apparency. And when this Queſtion was again brought under your Lordſhips Review, in the above-mentioned Competition between *Houſton* of *Johnſton* and *John Stewart-Nicolſon*, the like Judgment was given.

And there is no Incongruity, that theſe intermediate Rents may be carried by an Adjudication *cognitionis cauſa*, or even by Service of the next Heir connecting with the Perſon who died laſt infeft; becauſe that only obtains where there is no Queſtion with the Executors or Creditors of the intermediate apparent Heir. *In reſpect whereof*, &c.

ALEX. LOCKHART.

5 Dec. 1760

Auchinleck according to the principle of the feudal Law nothing vests but by service & infeftment

The Difficulty arises only from the Decisions

at first they were not allowed to levy the rents unless they found caution to pay the Debts. afterwards the rent further and allowed him to possess but preferred the predecessors debts to the apparent heirs. then the stepped on to find that the rents unuplifted went to executors.

As it is admitted that if there was no Competition the rents would be carried by a adjudication on a Decreet cognitionis causa then it must belong to the heir.

The apparent heir only by indulgence

as Mr Hamilton entered to this estate he would be liable for the apparent heirs debts therefore he must be intitled to the rents unuplifted

Sr John Houston's Case different. he might take without a title

James Rights ought not to depend on accident.

The apparent heirs possession & property in the rents intromitted undoubted & to make those unuplifted not to go to his executor is odd.

an adjudication Cognitionis causa in a remarkable case it proceeds on the renunciation of the apparent heir. his renunciation vests him out of the succession. an adjudication cognitionis causa against apparent heir of an apparent heir does not carry the rents unuplifted during the first apparent heirs life.

The old feudal Law the Land belonged to the superior without a renovatio feudi it did not go to the heir. an indulgence in the superior to allow the apparent heir to possess or posing the rents